Marvin Mathis #304144/244859-C
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625-0861

December 14, 2009

Jodi Ferguson, Esq.
Assistant Deputy Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101

Re: **State v. Marvin Mathis**
App. Div. Dkt. No. A-3695-07T4

Dear Ms. Ferguson:

Enclosed for filing in the referenced matter, please find a copy of my pro se supplemental brief and appendix on the merits of the instant appeal.

Upon filing please send the needed copies of the same to Designated counsel, Allen I. Smith, the Clerk of the Appellate Division and to the Office of the Attorney General.

Thank you very much for your courtesy.

Very truly yours,

Marvin Mathis

Marvin Mathis #304144/244859-C
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625-0861

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3695-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent;

V.

MARVIN MATHIS,

Defendant-Appellant.

CRIMINAL ACTION

On Appeal from a Denial of Petition for Post-Conviction Relief from the Superior Court of New Jersey Law Division, Union County

Sat Below:

Hon. John F. Malone, J.S.C.

PRO SE SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT MARVIN MATHIS

Marvin Mathis
#304144/244859-C
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

APPELLANT IS CONFINED

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PROCEDURAL HISTORY

On January 25, 1996, Union County Juvenile Delinquency Complaint No. FJ 20-01786-96-E was filed against defendant-appellant Marvin Mathis for acts which, if committed by an adult, would constitute the crime of armed robbery, contrary to N.J.S.A. 2C:15-1 and N.J.S.A. 2C:2-6, and felony murder, contrary to N.J.S.A. 2C:11-3a(a).

On October 10 and November 11, 1996, the Honorable Rudolph N. Hawkins, Jr. J.S.C., considered via stipulation by the parties the state's motion to refer defendant to the Superior Court Criminal Division, pursuant to N.J.S.A. 2A:4A-26. Judge Hawkins granted the state's motion to waive jurisdiction of the acts alleged in the juvenile complaint to adult court. (2MT 19-15 to 29-21).[1]

On February 4, 1997, a Union County Grand Jury returned Indictment No. 97-02-00123 charging defendant with first degree murder, contrary to N.J.S.A 2C:11-3a (1) and/or (2); in count

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[1] "1MT" refers to the transcript of October 10, 1996, Juvenile waiver hearing.
"2MT" refers to the transcript of November 11, 1996, Juvenile waiver hearing.
"3MT" refers to the transcript of June 9, 1998, Miranda hearing
"1T" refers to the transcript of June 10, 1998
"2T" refers to the transcript of June 11, 1998 (a.m.)
"3T" refers to the transcript of June 11, 1998 (p.m.)
"4T" refers to transcript of June 16, 1998
"5T" refers to the transcript of June 17, 1998 (a.m.)
"6T" refers to the transcript of June 17, 1998 (p.m.)
"7T" refers to the transcript of June 18, 1998
"ST" refers to the sentencing transcript of August 14, 1998
"PCR" refers to transcript of February 29, 2008 (PCR hearing)
" Da" refers to the appendix to this brief

two with first-degree armed robbery, contrary to N.J.S.A. 2C:15-1; in count three with felony murder, contrary to N.J.S.A. 2C:11-3a(3); in count four with second-degree possession of a firearm for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a; and in count five with third-degree unlawful possession of a weapon contrary to N.J.S.A. 2C:39-5b.

Following an unsuccessful Miranda[2] motion before the Honorable Judge John F. Malone, J.S.C., on June 9 and 10, 1998. Defendant was tried before Judge Malone and a jury on June 10, 11, 16, 17, and 18, 1998. Defendant was found guilty of all charges. (7T 82-18 to 84-1).

On August 14, 1998, the court sentenced defendant to an aggregate term of 50 years in prison, with a parole bar of 30 years. The appropriate statutory penalties were imposed, and defendant was given credit of 934 days for time in custody. (ST 10-16 to 12-6).

By Order of March 15, 1999, the Appellate Division granted the defendant's motion to file a notice of Appeal nunc pro tunc.

On appeal to the Superior Court of New Jersey Appeallate Division, defendant's conviction were affirmed on June 02, 2000.

Thereafter defendant sought further review of his case by way of a petition for certification which was filed with the Supreme Court of New Jersey, his petition was denied without a opinion on October 10, 2000.

On April 26, 2001 defendant filed a timely petition for

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[2] Miranda v. Arizona, 384 U.S. 1034, S.Ct. 1303 (1966).

post-conviction relief with the Criminal Case Manager of the Union County Superior Court.

On February 29, 2008, the Honorable Judge John F. Malone, J.S.C. denied defendant's petition for post-conviction relief without scheduling an evidentiary hearing. (Da 1).

On March 10, 2008, defendant filed a motion for reconsideration of the order denying defendant's petition for post-conviction relief. The matter was denied by Judge Malone on July 02, 2008 and expressed in his written letter opinion on July 03, 2008. (Da 2 and 3).

By Order of this Court filed on May 06, 2008, defendant was permitted to file his Notice of Appeal; to proceed as an indigent and for free transcripts on March 25, 2008. (Da 4).

STATEMENT OF FACTS

On the night of January 22, 1996, Antonio Saraiva was killed in front of his store by a gunshot wound to the head. The issue at trial was whether Marvin Mathis, a 15-year old special education student, who was in the company of a 20-year old man and two women shot Mr. Saraiva by his own hand during a robbery; was assisting the 20-year-old Antwan Harvey in a robbery when that the codefendant shot Saraiva; or whether the gun went off during a struggle while Mathis was trying to stop the codefendant Harvey from shooting Saraiva.

Antonia Saraiva and her husband, Antonio, owned the Portuguese American Wine and Liquor store on East Jersey Street in Elizabeth, and lived in an apartment above the store. According to Mrs. Saraiva, on January 22, 1996, sometime after 10:00 p.m., Mr. Saraiva closed the store and carried the trash cans to the street. Mrs. Saraiva, who remained in the store, heard shots, ran out from the back of the store, and down an alleyway to the locked security gates. She saw her husband on the ground. A "dark man," a "Jamaican" who used to frequent their store, was calling her husband by name. (1T 41-9 to 44-1; 1T 47-2 to 9) Mrs. Saraiva ran back into the house to get the keys for the security gates. When she returned and opened the gates, her husband was alone and unconscious. (1T 44-2 to 16).

Union County Medical Examiner Graciela Linares found a single bullet wound to Mr. Saraiva's head; she estimated that the gun was shot form a distance of eighteen inches or less.

(4T 23-1 to 5; 4T 25-3 to 28-18; 4T 34-7 to 12). The wound would have caused death within a few minutes. (4T 31-15 to 18)

Elizabeth police officers Gene Antonucci and Rocco Malgieri responded to the scene of the shooting. (1T 48-18 to 50-10; 1T 51-1 to 18) Antonucci searched the area for bullets or bullet casings, but found none. (1T 52-12 to 17) Malgieri found Saraiva's brown leather wallet on nearby South Park Street. (1T 59-14 to 63-13)

When Mathis' girlfriend, Sharlama Brooks, saw him in school the morning after the shooting, he asked her to tell anyone who asked that he was with her the night before between the hours of seven and 11. Brooks, who was home alone during those hours, was not willing to say they had been together. (1T 65-1 to 66-18) When she questioned Mathis about his request, he turned away from her and said that if he told her, she would "black out," which she took to mean that she would "get mad at him." (1T 66-21 to 67-7) Brooks told Mathis that on the previous night a man had confronted her and told her that Mathis had killed someone. At first, Mathis denied it, but he then told Brooks that "they was struggling I guess when the man was taking out the garbage and gun [sic] had went off, but it was by mistake." (1T 74-1 to 75-13) In her statement to the police, Brooks stated that Mathis told her he was walking with some friends, and "Marvin went to grab the guy, and as soon as he grab [sic] the guy the gun went off." (1T 76-24 to 77-3)

After Mathis told Brooks about the shooting, she became upset and started to cry. A school security guard who observed

her crying took her to Janice Sutton, a substance abuse counselor Brooks was still upset and crying when she related the story to Ms. Sutton. (1T 77-2 to 79-51) The police were summoned, and Brooks was transported to the police station where she gave a statement. (1T 79-9 to 14)

Janice Sutton, the high-school counselor, testified about her meeting with Sharlama Brooks. Brooks said her boyfriend had been involved in a shooting or a murder; Sutton could not remember the exact words used by Brooks. Sutton also stated that Brooks may have indicated that her boyfriend's name was Marvin. (4T 91-1 to 21-3; 4T 22-9 to 17) Sutton took Brooks to the principal's office. She later accompanied her to the police station and was present when Brooks gave her statement. (4T 21-20 to 22-6)

Detective Thomas Koczur took Brook's statement, after which he had Mathis transported to the police station. (2T 3-17 to 5-2; 2T 6-6 to 7-12) When Koczur first encountered Mathis in a conference room, he was not under arrest and was not in handcuffs. (2T 8-1 to 15) Koczur had another officer transport Mathis's mother to police headquarters. (2T 8-19 to 9-10)

Koczur advised Mathis's mother that her son was a suspect in a homicide. He explained the procedures they would be following and what their rights were. (2T 9-15 to 10-3) Koczur also advised Mathis of his rights. Mathis indicated that he understood those rights and agreed to answer questions. Mathis's added her consent. (2T 12-6 to 16-11)

At first, Mathis denied any involvement in the homicide,

stating that he was either at a different location or with his girlfriend at the time. When Koczur confronted him with Brook's statement, Mathis called her a liar. As he was confronted with further inconsistencies in his story, he asked that his mother leave the room, and he then gave a statement admitting his presence at the shooting. He repeated the statement in his mother's presence. (2T 17-2 to 19-21) In his oral statement, Mathis said that he, Antwan Harvey, and a man from Carteret called "Boz" were involved in the shooting. At the conclusion of the oral interview, Koczur took what would be the first of two written statements. (2T 20-17 to 21-18; 2T 36-16 to 24)

In the first statement, Mathis indicated that he met Harvey and Boz sometime after 7:00 p.m. on January 22, 1996. Harvey and Boz were looking for someone to rob, and they wanted Mathis to hold the gun. Mathis refused. (2T 21-21 to 30-23) Harvey came upon a man who owned a liquor store as he was taking out the garbage and told the man, later identified as Saraiva, to empty his pockets. When Saraiva said no, Harvey tried to go through his pockets:

> Then they started fighting. The man threw a punch at Antwan [Harvey], and then Antwan threw a punch back. Then Antwan pushed him, then he shot him. The man fell. Antwan went into his pockets. He then told me to go into his pockets. I said no. He then called me a punk. Then I was in shock.

(2T 31-9 to 18) Following the shooting, they ran off. (2T 31-19 to 22) Before leaving, Harvey took the victim's wallet from his right back pocket. (2T 34-12 to 16)

After they took the first statement, the police executed

a warrant at a residence in Carteret, where Detective John Furda of the Union County Prosecutor's Office seized items of clothing described by Mathis. (2T 43-23 to 44-23) With the consent of Mathis and his mother, Detective Furda searched their home and seized pants fitting the description Mathis gave of the pants he wore on the night of the robbery. (2T 47-19 to 49-25; 3T 158-3 to 159-25)

While Furda was searching Mathis's home, Koczur met with other investigators. He returned to question Mathis again, telling Mathis he did not believe what he had said in his first statement. (2T 50-13 to 51-12)

At his second interview, Mathis indicated that the gun went off during a struggle between him and Harvey. Mathis was trying to stop Harvey from shooting the liquor store owner. In his second statement, Mathis indicated that at about eight o'clock on the night of the offense, he met Harvey on a street corner in Elizabeth, and they met April Diggs and Renee Diggs (cousins) at a nearby Chinese restaurant. Mathis, Harvey, and the Diggs cousins intended to participate in a robbery. (2T 51-13 to 21; 2T 56-23 to 59-14; 2T 63-17) While walking on Elizabeth Avenue, Harvey displayed a black revolver and asked Mathis to act as lookout during the robbery. When Harvey suggested robbing a man standing nearby, Mathis told him not to. Mathis also told Harvey he would not participate in the robbery of a nearby deli. (2T 59-15 to 61-5) As they continued walking, the four of them came upon "two Spanish boys." Harvey and April "started running after them real hard, and me and

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the other girl jogging after them." The Spanish bys outran them. (2T 61-20 to 62-6)

The four continued walking. By the time they came upon Saraiva, it was no longer Mathis's intention to take part in a robbery. Mathis explained that Saraiva was shot while Harvey was attempting to rob him. Havrvey first tried to search Saraiva pockets, prompting Saraiva to slap Harvey's hand. Harvey grabbed Saraiva, who then grabbed Harvey. They exchanged punches, and Harvey pulled out a gun, which Saraiva grabbed. Mathis joined the struggle to prevent Harvey from shooting Saraiva. During the three-way struggle, the gun went off twice. The second shot struck the victim. Mathis did not believe that Harvey intended to shoot anyone. After the shooting, Harvey went through Saraiva's pockets. Neither Mathis or the two women, who had been serving as lookouts, touched Saraiva. (2T 62-7 to 15; 2T 63-25 to 66-18) During Mathis's statement, the detective asked him: "So all four of you committed this robbery?" Unlike Mathis's other answers, which were all typed, that question was answered with a handwritten "yes," followed by Mathis's initials. Koczur believed that Mathis had written the answer when he read the completed statement. (2T 69-6 to 70-14; 2T 88-4 to 89-12) During his testimony, defendant denied ever having written "yes" on the statement. (4T 155-9 to 24)

As a result of Mathis's statements, arrest warrants were authorized for April and Renee Diggs and Antwan Harvey, and the police seized clothing Mathis had said they wore during the robbery, including a black ski which was obtained pursuant

to a warrant from the home of Stephen Owens, a close friend of all the defendants. (2T 76-2 to 79-4)

Migdalia Heranadez, who lived with Owens in Elizabeth, testified that Mathis, Harvey, and the Diggs were friends of hers, and regularly visited her apartment. (3T 166-5 to 167-24) They were all in her apartment on January 22, 1996. As the four were leaving, Hernandez heard "one of them say they had a gun." She did not know who made the statement, nor did she ever see s gun. (3T 167-25 to 168-14; 3T 174-2 to 3) When they left, Mathis and Harvey were carrying black face masks. The four returned about an hour later, and the two males were still carrying the face masks.

Hernandez did not remember what time the four left or when they returned. (3T 169-15 to 170-16) Hernandez waited six months before giving this information to the police, claiming that although they were all close friends, and Harvey visited her virtually every day, she did not know that they had all been arrested in January. She did not learn of the arrests unitl the police came to her house six months later. (3T 172-10 to 173-20)

In exchanged for their pleas to armed robbery, April Diggs, who was 17-years old at the time of the shooting, and her cousin Renee Diggs, who was 22-years old, both testified for the state. As a condition of their plea agreements, they were to receive sentences of 15 years with five-year parole bars. As part of agreement, which would shield them from the charges of murder and felony murder, they had to testify against both Mathis and

Harvey. (3T 177-3 to 16; 4T 51-14 to 51-23; 4T 74-1 to 10) According to April, on January 22, she and her cousin Renee met Harvey and Mathis, not in the Hernandez apartment as Hernandez testified, but at a Chinese restaurant. When they left the restaurant, April believed they were headed toward a liquor store. As they reached the pharmacy across the street from the Portuguese American Liquor store, Harvey announced that he "wanted to go rob somebody, and he wanted us to be the lookout." (3T 180-14 to 181-16; 3T 211-9 to 17) April and Mathis continued walking, but said nothing. Harvey said "something about busting somebody," and Mathis said he would, too. April thought they meant to shoot someone. At this point, Harvey gave Mathis a small black gun. (3T 181-17 to 182-15; 3T 183-9 to 15) When the prosecutor showed April the gun taken from Harvey's house, she stated that this was not the gun Harvey had on the night of the shooting. Harvey's gun had a different color handle. (3T 182-19 to 183-4)

As they walked, April observed a man, later identified as Saraiva, coming out of his house with the garbage. Harvey ran toward Saraiva, with Mathis following. April continued walking, but turned when she heard one or two gunshots. She saw Saraiva fall and Mathis and Harvey run off. April did not see the shooting, but Renee told her that Mathis shot Saraiva. (3T 183-19 to 185-16; 3T 186-12 to 15; 3T 204-10 to 17) Later that evening, at Hernandez's house, April asked Mathis Why he Saraiva. Mathis said it was because the man grabbed him. (3T 187-5 to 16) In her statement to the police and at her guilty

plea, April indicated that it was Mathis who fired the gun. (3T 188-4 to 10; 3T 196-19 to 25) In her statement she also indicated that she did not participate in the robbery or serve as a lookout. She guilty because the state agreed not to prosecute her for felony-murder. (3T 199-3 to 200-10)

According to April, they did not chase anyone before they assaulted Saraiva, and they did not discuss robbing a deli. (3T 201-16 to 202-6) She did not remember seeing Mathis or Harvey wearing masks on the night of the shooting. (3T 206-2 to 12) After the shooting, both April and Renne was a man from the neighborhood, whom she knew as "Jamaica" going though the victim's pockets. (3T 204-21 to to 205-15; 4T 72-15 to 73-3) April denied that Harvey told her to place the blame on Mathis. (3T 203-8 to 12)

Herminia Garcia, a social worker at the Union County juvenile detention center, testified that April told her that neither she, her cousin Renee, nor Mathis had anything to do with the shooting, and that a fourth individual who was with them them was responsible for the shooting. (4T 110-1 to 111-22) Garica could not remember the date April made that statement, nor did she make a written notation of the conversation. She advised April to give the information to her attorney.[3] (4T 112-2 to 115-23; 4T 123-19 to 22)

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[3] April Diggs admitted that after her arrest she was taken to the Union County Detention Center and met with social worker Garica. She did not recall, however, telling Garica that it was Harvey, and not Mathis, who did the shooting: I doubt if I said that." (3T 206-23 to 207-7)

Renee Diggs testified that Harvey and Mathis asked her and her cousin to serve as lookouts for a robbery. (4T 45-6 47-8) although April testified that they did not accost anyone else prior to the Saraiva robbery (3T 201-16 to 202-6), Renee stated that Harvey and Mathis had chased two "Spanish men." (4T 47-16 to 48-7) At some point, Harvey pulled a gun from his pants and started "acting crazy with the gun." According to Renee, Harvey was "just showing off," although he released the safety control and indicated that he was going to shoot some cops who were walking nearby. (4T 61-17 to 62-6; 4T 64-3 to 19)

When they came upon the man taking out the garbage, Renee heard Mathis say, "That one right there." (4T 49-19 to 50-1) Although she did not see the transaction, Renee assumed that Harvey gave his gun to Mathis, because she observed Harvey give something to Mathis and saw Mathis go up to the man taking out the garbage. Renee saw the man grab Mathis by the jacket, saw a flash of light, and then saw the man fall. Mathis and Harvey then ran from the scene together. (4T 50-3 to 51-8; 4T 63-11 to 25)

Renee also claimed that when she saw Harvey hand Mathis the gun, Mathis said, Oh, yes, it's on." (4T 54-5 to 13) On the day of her arrest, January 25, 1996, Renee gave a statement to the police identifying Mathis as the shooter, (4T 51-24 to 52-13) Contrary to April's testimony, Renee claimed they did not encounter Mathis on the stairs when they returned to Hernandez's apartment. (4T 65-3 to 23)

Renee amitted that she was afraid of Harvey and did not leave the group when there was talk of committing a robbery because Harvey physically prevented her from doing so. She denied, however, that Harvey threatened her and told her to place the blame on Mathis because Mathis was a juvenile. (4T 66-23 to 67-5)

Damina Arcos testified that she met Renee Diggs in jail. In November of 1997, Renee told her that it was Harvey who shot the liquor store owner. (6T 140-20 to 141-19) Arcos had learned about the trial from Detective Koczur a week before the trial. She told Koczur about Renee's statement, and he told her to bring the information the prosecutor.[4] (6T 142-22 to 144-24)

Three days after the shooting, Detective Furda, accompanied by Carteret Police Detective-Sergeant McFadden, arrested Harvey at his home in Carteret. McFadden retrieved an unloaded .32 caliber revolver from a crawl space at the top of the stairs leading to the second floor. The gun dark blue and appeared to be almost black. (3T 160-1 to 161-23; 3T 164-11 to 165-22) According to Furda, without bullets or casings, there was no determine whether the firearm was the one used to shoot Saraiva. (3T 162-2 to 7) Neither Mathis nor Harvey had a permit to purchase or carry a handgun. (4T 36-17 to 37-12)

Two of Mathis's teachers, Ronald Orr and Belquis Fernandez, testified on his behalf, indicating that they knew Mathis to be truthful. (4T 91-7 to 15; 4T 97-15 to 102-24)

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[4] During her testimony, Renee Diggs denied knowing Arcos and that she had ever admitted defendant was not the shooter. (4T 67-5 to 68-4)

Marvin Mathis denied that he possessed a gun, participated in a robery, shot anyone on January 22, 1996. (4T 157-8 to 18) On the evening of January 22, he was walking in Elizabeth with Harvey and the Diggs cousins. Harvey noticed a man waiting for a bus and asked girls to see if the man was wearing any gold jewelry. When the girls reported that he was, and Mathis realized that Harvey wanted to rob him, Mathis told Harvey not to. (4T 130-20 to 133-17) April then urged Harvey to rob the owner of a deli they continued walking. (4T 133-23 to 134-7; 5T 39-3 to 22) Thereafter, Harvey and April ran after two "Spanish boys," Mathis and Renee jogged behind, but the boys outran them. (4T 134-8 to 17; 5T 95-1 to 6) Mathis did not know Harvey had a gun until he pulled it out and started "acting crazy" and "showing off." At one point, Harvey said he wanted to shoot at police officers who were walking nearby. He took the safety attachment off of the gun, but did not pull the trigger. Mathis was scared, but thought that if he tried to leave Harvey would shoot him. When Renee had tried to leave, Harvey grabbed her and refused to let her leave. (4T 134-18 to 135-25; 5T 57-15 to 21)

When they reached the corner of Seventh and East Jersey, Harvey noticed Saraiva taking out his garbage out and told the girls to serve as lookouts. Harvey asked Mathis to be a lookout, but refused. (4T 136-10 to 16) Mathis was scared. He walked across the street and stood next to a Chinese restaurant. Harvey approached Saraiva and it sounded like he was telling Saraiva to empty his pockets. Harvey tried to reach into Saraiva's pockets, and Saraiva slapped Harvey's hand down. At that point,

Harvey grabbed Saraiva and the man grabbed Harvey, and they traded punches. Harvey pulled out his gun and Saraiva grabbed for it. As the two struggled, Mathis grabbed Harvey's arm to prevant him from shooting Saraiva. The gun went off once, missing Saraiva, and Harvey fired a second shot that struck him. (4T 136-17 to 25, 4T 139-1 to 140-10) Mathis was shocked when Saraiva fell, and ran off with Harvey. (4T 140-13 to 17)

Mathis had not intended to participate in the robbery or help Harvey in any way. (4T 141-2 to 5) He did not leave Harvey once he realized Harvey wanted to commit a robbery because he he was afraid Harvey would shoot him. (4T 152-19 to 21) After the shooting, Mathis ran home, refusing to take the gun from Harvey. At no time did Mathis possess the gun. (4T 141-15 to 142-10)

Mathis denied asking his girlfriend Sharlama Brooks to say that he was with her on the night of the shooting. According to Mathis, "I say if anyone ask if I was with her...that she don't know." (4T 142-22 to 143-20) He also denied ever telling her that he had shot someone accidentally. (5T 69-23 to 25) With regard to the questioning at police headquarters, Mathis indicated that he was not given a choice about going there, and he lied to the police when he gave his first statement because he was scared. Moreover, although he signed the rights form, the police were "rushing" him, and his understanding of his rights was "not that good." Although his first statement to the police was not true, due to his being scared and confused, his second statement was truthful. (4T 145-22 to 152-8; 4T 168-

25 to 169-5; 5T 3-11 to 4-18)

On the morning of January 24, 1996, Mathis's mother, Linda Mathis, was taken by the police from her job to the police headquarters so that she could by present while they questioned her son. Mrs. Mathis did not recall much of what transpired, but she did remember that her son claimed he had not known what Harvey was up to and that he "didn't do anything", "he said he wasn't involved." (6T 146-20 to 148-13; 6T 155-15 to 17) Her son was questioned until midnight. At one point she and her son signed a consent-to-search form, and she accompanied the police to her house where they conducted a search. (6T 149-2 to 151-14) Mrs. Mathis indicated that she signed and understood the form explaining Mathis's constitutional rights. (6T 151-16 to 23) Although Mathis believed one of the detectives was "putting words" in her son's mouth (6T 156-24 to 25), she and her son both signed his statement. (6T 157-4 to 21)

POINT I

THE DEFENDANT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART I, PAR 10, OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY ASSIGNED PCR COUNSEL'S FAILURE TO COMPLY WITH R. 3:22-6(d) BY NOT ADVANCING THE DEFENDANT'S ARGUMENTS SET FORTH IN HIS FEBRUARY 24, 2005 PRO SE MEMORANDUM OF LAW AND APPENDIX ON PCR

Pursuant to the New Jersey Court Rules, Rule 3:22-6(d) requires that assigned PCR counsel bring forth to the PCR Court all claims raise by the defendant. R. 3:22-6(d) provides in pertinent part:

> Counsel [assigned to represent a defendant on a petition for post-conviction relief] should advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit.

Interpreting this rule, New Jersey Supreme Court stated in State v. Rue, 175 N.J. 1 (2002):

> [C]ounsel must advance the claim the client desires to forward in a petition and brief and make the available arguments in support of them. Thereafter, as in any case in which a brief is filed. counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument. In no event however, is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate them, or to render aid and support to the state's opposition. That kind of conduct contravences [R. 3:22-6(d)].
>
> [Id. at 19].

In State v. Webster, 187 N.J. 254 (2007), the New Jersey Supreme Court refined Rue, stating:

> Reduced to its essence, Rue provides that PCR

> counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all the legitimate arguments that the record will support. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them.
>
> [Id. at 257].

In the instant case, on the date of February 24, 2005, appellant filed a pro se memorandum of law and appendix in support of his petition for post-conviction relief, which presented the following argument:

Point I: Defendant's State Constitutional Right to Indictment by Grand Jury was Violated when the Facts Required to be found before Defendant could be tried as a Adult were not Charged in the indictment. Furthermore, Defendant's Federal and State Constitutional Rights to Trial by Jury were Violated when a judge made the Findings that Resulted in Defendant being Tried as an Adult, and not as a Juvenile.

Point II: Defendant's Federal and State Constitutional Right to a Jury Trial were Violated when the Trial Judge Found the Aggravating Factors used to Increase Defendant's Sentence for Murder Beyond the Prescribed Maximum. Furthermore, Defendant's (State Constitutional) Right to Indictment by Grand Jury was Violated when the Aggravating Factors used to Increase the Sentence for Murder were not Charged in an Indictment.

Point III: Defendant's Waiver of his Miranda Rights was not Knowing and intelligent Because Defendant was not Informed that, Although He was a Juvenile, any Statement made by him could be used Against Him in a Prosecution as an Adult.

Point IV: Trial Counsel was Ineffective for Failing to Present Evidence of Defendant's Low Intellectual Functioning in Order to Establish that Defendant's Waiver of His Miranda Rights was not Knowing and Intelligent.

Point V: Trial counsel was Ineffective for not Presenting in Mitigation of Sentence the Evidence of Defendant's Low Intellectual Functioning and Personality Disorder.

Point VI: The New Rule Proposed in Point III Should be Retroactively to Applied to Defendant.

Point VII: The Claims for Relief are not Barred by a Procedural Rule.

(Da 13, 18, 22, 27, 35, 39 and 42).

Appellant's pro se memorandum of law and appendix was submitted to the trial court, through the criminal case management office, which was mailed by way of first class United States postage, pre-paid, through the New Jeresy State Prison's CO-30a "Postage Remit System." Postage fees were withdraw from appellant's "Inmate Trust Account Statement." (Da 77, 78, 79 and 80).

On April 25, 2005, appellant wrote a follow-up letter to the criminal division manager, Andrea Ferraro requesting notification of the filing of appellant's pro se memorandum of law and appendix. The follow-up letter was also mailed by way of first class United States postage, pre-paid, through the New Jersey State Prison's CO-30a "Postage Remit System." Postage fees were withdraw from appellant's "Inmate Trust Account Statement." (Da 81, 82 and 83).

The same follow-up letter of April 25, 2005, that was

written by appellant was forwarded back to him from the criminal division manager, Andrea Ferraro time-stamping the letter as "Received and Filed." on May 02, 2005. (Da 81).

During the preliminary hearing for post-conviction relief, PCR counsel testified to the following:

> [PCR counsel]: Okay. Thank you, Your Honor. I'm not going to go through all the details. You've read the briefs.

(PCR-T 5-2 to 4).

PCR counsel was remiss, however, in failing to present any of appellant's remaining claims Point I (Da 13) and Point III (Da 22) contained in his pro se memorandum of law at the PCR hearing.

Appellant subsequently filed a pro se motion for reconsideration of the order denying his petition for post-conviction relief, the basis for the rehearing request was that PCR counsel failed to advance appellant's remaining claims in his pro se memorandum of law and appendix at the PCR hearing as required by R. 3:22-6(d), Rue, supra. and Webster, supra.

On July 02, 2008, the PCR trial court denied appellant's motion for reconsideration and discussed it in his written letter opinion dated July 03, 2008. (Da 2 and 3).

Appellant contends that PCR counsel is in direct violation of R. 3:22-6(d) Rue, supra. and Webster, supra., it was incumbent upon counsel to advance the remaining claims contained in appellant's pro se brief. By not advancing the remaining claims therein was contrary to Rue, supra. 175 N.J. at 19. In Webster, supra. the court explained that the brief must advance the arguments that can be made in support of the petition and

include defendant's remaining claims, either by listing them or incorporating them by reference, so that the judge may consider them. 187 N.J. at 257.

Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus and is a safeguard to ensure that a defendant is not fairly convicted. State v. Afanador, 151 N.J. 41, 49 (1997). Ordinarily, PCR allows a defendant to challenge the legality of a sentence or final judgment of conviction by presenting arguments that could not have been raised on direct appeal. Ibid. As stated in State v. Preciose, 129 N.J. 451 (1992), the New Jersey Supreme Court has a compelling judicial interest in sustaining only those convictions free from constitutional errors." Id. at 454; See also State v. Mayron 344 N.J. Super. 382, 386 (App. Div. 2001) (remarking that post-conviction relief is crucial component of criminal process provided to defendants).

The Rue court further stated that:

> PCR is a defendant's last chance to raise constitutional error that may have affected the reliability of his or her criminal conviction. It is not a pro se forma ritual. That is why we require provision of counsel. Under our scheme that attorney is responsible to communicate with his client and investigate the claims. State v. Velez, 329 N.J. Super. 128, 133 (App. Div. 2000); State v. Casimono 298 N.J. Super. 22, 27 (App. Div. 1997) remanding case to trial court to determine whether PCR counsel fulfilled his obligations to interview trial counsel, meet with defendant, submit brief, and argue on behalf of defendant); State v. King, 117 N.J. Super. 109, 111 (App. Div. 1971). Based on that communication and investigation, counsel then must "fashion the most effective arguments possible." Velez, supra. 329 N.J. Super. at 133.
>
> [Rue, supra. 175 N.J. at 18].

As demonstrated herein, appellant did not receive the representation guaranteed by R. 3:22-6(d). Assigned PCR counsel on appellant's first petition for post-conviction relief failed to comply with his obligations under R. 3:22-6(d), as interpreted in Rue and Webster.

Furthermore, fundamental precept of law was violated in this case and as such, appellant's case should be remanded back to the trial court for assignment of new counsel as if on a first PCR petition, and conduct a new hearing in conformity with Rue, supra.175 N.J. at 12-13.

A.

PCR COUNSEL FALIED TO INVESTIGATE, INTERVIEW AND SECURE AFFIDAVITS FROM THREE EXPERT WITNESSES, SUCH PSYCHOLOGICAL EVIDENCE WAS CRUCIAL IN ADVANCING DEFENDANT'S COMPETENCY CLAIM ON PCR, CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS.

As stated earlier, R. 3:22-6(d) provides that:

> Counsel [assigned to represent a defendant on a petition for post-conviction relief] should advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit.

The Rue court interpreted R. 3:22-6(d) as requiring that:

> [C]ounsel must advance the claims the client desires to forward in a petition and brief and the best available arguments in support of them. Thereafter, as in any case in which a brief is filed, counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument. In no event however, is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate them, or to render aid and support to the state's opposition. That kind of contravences [Rule 3:22-6(d)]. 175 N.J. at 19

The New Jersey Supreme Court in Webster refined Rue stating that:

> Reduced to it's essence, Rue provides that PCR counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of legitimate arguments that the record will support. If after investigation counsel can formulate no fair legal argument in support of a particular claim raised by defendant no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them. 187 N.J. 257.

In the instant case, on July 31, 2006, appellant wrote a letter to assigned PCR counsel Lewis D. Thompson and mailed it by way of certified mail. (Da 85). In the contents of the letter appellant provided counsel with addresses of the three expert witnesses: Dr. Cheryl L. Thompson, Dr. Martha H. Page (for the defense) and Dr. Louis B. Schlesinger (for the state) in order to advance appellant's competency claim on PCR. (Da 86 and 87).

On September 14, 2006, appellant filed with the Criminal Case Management Office a second amended petition in support of his petition for post-conviction relief, which provides in pertinent part as follows:

> 4. To substantiate [defendant's] competency claim set forth in his supplemental verified petition for post-conviction relief, which was submitted [dated February 02, 2006] [Defendant] requests that assigned counsel Lewis D. Thompson to interview and obtain affidavits from the expert witnesses: Dr. Martha H. Page, Ed. D., Dr. Cheryl L. Thompson, Ph. D., and Dr. Louis B. Schlesinger, Ph.D.

(Da 95 and 96).

Appellant second amended petition for post-conviction relief was mailed by way of first class United States postage, pre-paid, through the New Jersey State Prison's CO-30a "Postage Remit System", which postage fees were withdraw from appellant's "Inmate Trust Account Statement." (Da 89, 90, 91, and 92).

PCR counsel was aware of the expert witnesses through the juvenile waiver hearing transcripts where three expert reports were stipulated into evidence (2MT 20-19) and then summarized by defense counsel for appellant (2MT 4-18 to 9-20) and by

counsel for the state. (2MT 9-21 to 10).

PCR counsel was plainly aware of the family court's findings with respect to the appellant: 15 years and ten months old at the time of the charged crimes (2MT 10-1); does not have any substantial history of delinquency (2MT 23-19 to 20); the appellant had not benefited from education (2MT 24-5 to 12); was a follower (2MT 24-2); was unable to make decision on his own (2MT 25-25); appellant's mental acumen was borderline (2MT 26-24); and that appellant's lack of academic acumen was so severe as to be relevant to the appellant's rehabilitate potential. (2MT 27-4 to 15).

Dr. Cheryl L. Thompson, Ph.D., defense expert, conducted a mental status exam and reviewed appellant's school records. In her reports dated February 10, 1996, she reported that the appellant was fully aware of [my] role in his judicial process, but did not seem to have a full picture of his judicial position. (Da 45). The appellant's intelligence was borderline to low average. (Da 46). Appellant's ability to think abstractly was poorly developed. (Da 47). attention and concentration were impaired. (Da 47). appellant "is not bright and is easily confused." (Da 47). appellant was not capable of realizing incompatible career goals. (Da 47). Appellant was quite confused about his involvement in a serious crime. (Da 48). appellant behavior was that of a person whose judgment was clouded. (Da 49).

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[5] Defense counsel Walter Florczak also represented the appellant at trial.

It is also significant, with respect to PCR counsel's notice of facts materially relevant to the issue of appellant's competency, that Dr. Thompson explicitly found that the "appellant should have a complete diagnostic assessment as he may be functioning a[t] the level of retardation." (Da 48).

Dr. Martha H. Page, Ed. D., defense expert, performed a comprehensive psychological evaluation encompassing numerous types of examinations, sources, and analytical methods on May 14, 1996. Dr. Page cataloged the appellant's numerous cognitive, analytical and decision making deficiencies on practically every page of her report. She reported that appellant: repeated first and second grades. (Da 52). was communication handicapped. (Da 52). was unable to retain details in a story. (Da 52). had problems in retaining and processing information. (Da 52). had difficulty remaining focused. (Da 52). Had a need for assistance with concepts and skills related to organization of ideas. (Da 53). Had difficulty completing sentences. (Da 54). scored intellectually deficient on processing speed I.Q. and verbal scale I.Q. (Da 54). had difficulty verbal materal quickly. (Da 55). had difficulty planning ahead. (Da 55). lacked abstract thinking necessary to develop complex hypotheses in a novel situation. (Da 56). had difficulty in using perceptual cues to aid in solving problems. (Da 56). had difficulty seeing relationships in an unfamiliar situation. (Da 56). had difficulty in seeing things through carefully when in an unfamiliar situation. (Da 57). was slow to process information. (Da 58). and lacked problems solving skills. (Da 59).

Dr. Louis B. Schlesinger, Ph.D., the state's expert, conducted a thorough psychological assessment of the appellant in his report dated October 10, 1996, Dr. Schlesinger noted that the appellant's low level of intellectual functioning throughout his report: appellant had an I.Q. of 79. (Da 66). and had verbal skills at the low end of the dull-normal range. (Da 66). appellant had a weak "fund" of general information suggesting that appellant has not profited a great deal from school or experience. (Da 67). has some basic understanding of the world around him, but it is not that deep or extensive (Da 67). had difficulty drawing supertoidinate relations between objects and ideas, and "More complex abstractions, such as proverb interpretation, were to difficult." (Da 67). has difficulty analyzing, sythesizing, and integrating parts into a whole concept. (Da 68). appellant can learn new material, but is not really quick, and "several repetitions and often necessary to transfer new knowledge into pre-existing structures." (Da 68). appellant was displaying signs of personality disorder with impulse and antisocial traits. (Da 69). and showed indications of suspiciousness and mistrust. (Da 71).

During the preliminary hearing for post-conviction relief, excerpt of Dr. Cheryl Thompson's finding was read into the record by PCR counsel as evidenced by the foolowing:

> [PCR counsel]: Your Honor, Dr. Thompson in her own report stated that [appellant] should have a subsequent evaluation, a psychiatric evaluation, to determine his level of retardation and competence. That was not done.

(PCR-T 7-6 to 10).

In Rue, the New Jersey Supreme Court explained that in a PCR setting, "an attorney is responsible to communicate with his client and investigate claims." Rue, supra. 175 N.J. at 18. Further, such an attorney must also advance any claim insisted upon by a defendant, regardless of whether the attorney deems them without merit. Id. at 17. See R. 3:22-6(d) and also Webster, supra. 187 N.J. at 257.

In the instant case, it is clear that PCR counsel never investigated appellant's competency claim nor did he interview any of the three expert witnesses and secure their affidavits. In a PCR matter, this type of showing is most certainly necessary to advance a defendant's PCR claim. See State v. Cummings 321 N.J. Super. 154 (App. Div. 1999), certif. denied. 162 N.J. 199 (1999), this court stated that:

> Thus, when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification. See R. 1:6-6.
>
> [Id. at 170].

In State v. Velez, 329 N.J. Super. 129 (App. Div. 2000), This court recognized "it was not enough for counsel to blandly recite defendant's poorly articulated and inadequately presented arguments. The attorney's passing familiarity with defendant's claims satisfied neither the mandate of our rules nor counsel's professional obligations." Velez, supra. 129 N.J. Super. at 134. The Velez court went on to state:

> The benchmark for judging ineffective assistance of counsel claims is whether the defense attorney's professional errors "materially

> contributed" to the defendant's conviction [citing State v. Fritz, 105 N.J. 42 (1987)]. As a general rule, the defendant must prove prejudice -- that is, he must establish "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d. 674, 698 (1984). A reasonable probability "is a probability sufficient to undermine confidence in the outcome. Ibid.
>
> That standard is difficult to apply in the context of evaluating a claim of ineffective assistance of post-conviction relief counsel Only by an exhaustive examination of the entire trial record can it be determined whether a viable attack might have been made on the underlying conviction. It is arguable that this should be the job of the appellate attorney's who challenge the quality of the defense lawyer's representation of the defendant in the post-conviction relief proceedings. But often the trial record will not fully disclose all avenues that could have been pursued by post-conviction relief counsel in attacking the underlying judgement. Cf. State v. Preciose, 129 N.J. 451, 609 A.2d. 1280 (1992).
>
> We think a different rule should be applied in a case such as the one before us. where the defendant's post-conviction relief attorney entirely failed to subject the prosecution's case to meaningful adversarial testing. See United States Cronic, 466 U.S. 648, 659 104 S.Ct. 2039, 2047, 80 L.Ed.2d. 657, 688 (1984). Where, as here, the attorney's representation of the defendant amounts to no representation at all, the post-conviction relief process should begins anew with the appointment of an attorney willing and able to serve as an advocate for his client."
>
> [Velez, supra. 129 N.J. Super. at 134-135].

In the instant case, there is simply no question that appellant did not receive effective assistance of counsel on his first petition for petition for post-conviction relief. PCR counsel's failure to investigate, interview and secure

affidavits from the three expert witnesses constitutes ineffective assistance at appellant's PCR proceeding. PCR counsel's representation, therefore, was constitutionally deficient under the requirements and standards as set forth in R. 3:22-6(d), Rue, Webster, and Velez. For the aforementioned reason, the order denying post-conviction relief should be reversed and the matter remanded for a full evidentiary hearing.

B.

PCR COUNSEL FAILED TO RAISE ON PCR INEFFECTIVE ASSISTANCE ON APPELLATE COUNSEL FAILURE TO RAISE ON DIRECT APPEAL, TRIAL COUNSEL'S FAILURE TO ELICIT THE AID OF AN EXPERT WITNESS TO ILLUSTRATE DEFENDANT'S LIMITED MENTAL ABILITY AND HIS STATUS AS A SPECIAL EDUCATION STUDENT, CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENT

On January 29, 2008, appellant wrote PCR counsel a letter and mailed it by way of certified mail. (Da 99). In that letter, appellant informed counsel that there were two potential issues that he would like for him to examine on PCR, ineffective assistance on trial and appellate counsel. Both counsels were prejudically ineffective for failing to illustrate appellant's limited mental ability and his status as a special education student. (Da 97). The contents of the letter appellant provided PCR counsel with correspondences between appellate counsel Paul Klein and appellant. (Da 98).

Appellate counsel Paul Klein wrote appellant a letter dated July 21, 1999, informing appellant that the evidence of his status as a special education student cannot raised on direct appeal because there is nothing in the record to support the argument. (Da 101).

Appellant then wrote appellate counsel a letter and mailed it by way of certified mail dated May 23, 2000 (Da 104), bringing to appellate counsel's attention the extended discussion between trial counsel and the prosecutor at sidebar regarding the need of expert testimony to illustrate appellant's status as a special education student. (Da 103). (4T 114-19 to 117-12).

Throughout appellant's trial, trial counsel repeatedly made references of appellant's status as a special education student at the Miranda hearing (3MT 48-15 to 21); in defense opening statement (1T 39-12 to 15); during the testimony of Detective Thomas Koczar (2T 97-8 to 10); defense summation (6T 188-18 to 19). Counsel even made reference of appellant's mental status during sentencing. (ST 3-1 to 3).

Appellant's mental status became the focus of significant attention at sidebar where a lengthy discussion took place between trial counsel and the prosecutor. The prosecutor was troubled when trial counsel asked Detective Thomas Koczar if he was aware that appellant was a special education student. The prosecutor immediately requested the trial judge to give a curative instruction to the jury. The prosecutor and trial counsel exchanged the following:

> **[Prosecutor]:** While there is some testimony of special education, you know, you should not assume what the meaning of that is. You can only make determinations based, based on the evidence and testimony. And that is something that requires expert testimony. Because that's a kind of reverse inflammatory.
>
> **[Trial counsel]:** I think the request is premature at this point.
>
> **[Prosecutor]:** The jury is thinking [appellant] is too stupid to give a statement, he is more likely to be malleable and led into this. Because I know I have thoughts about special education, but I never had any experience so I don't know what it actually is.
>
> **[Trial counsel]:** I asked the question based on the fact that he is a special education student.
>
> **[Prosecutor]:** So what is he -- advanced, middle level, low level?

> **[Trial counsel]:** It goes to the voluntariness of the statement, whether the officer was aware at the time. (emphasis added).

(4T 115-4 to 22).

The trial record clearly reveals that there was a dire need for an expert based on the fact that appellant was classified as a special education student. (4T 116-14 to 15). The record also reveals that the prosecutor was concerned that the jury was thinking [appellant] "was too stupid to give a statement ... [and] is more likely to be malleable and led into this." (4T 115-12 to 14). Had trial counsel called an expert to confirm appellant's mental status to highlight what the jury was already thinking, it is not a far stretch to reasonably assume that the outcome of the trial would have had different results.

Trial counsel had actual and constructive evidence that appellant was classified as special education and communication handicapped. Counsel, however, did not elicit the relevant evidence at trial. (4T 116-1 to 3). The trial record further demonstrates that counsel had ample opportunity to bring in an expert to explain what appellant's status as a special student meant, but counsel outrightly refused to elicit aid an expert as evidenced by the following:

> **[Trial counsel]:** I won't call an expert. All I am saying school administrator, custodian of that record saying he is classified as special ed. As to the basis of it you already have that discovery. (emphasis added).

(4T 116-13 to 16).

New Jersey courts have found that the right to effective assistance of counsel under Article I, paragraph 10 of the New

Jersey Constitution includes the right to the assistance of experts.[6] State v. Difrisco, 174 N.J. 195, 243-44 (2002); State v. Green, 55 N.J. 13, 18 (1969). In Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985), the United States Supreme Court declared that under the Fourteenth Amendment to the Federal Constitution, an indigent defendant must be supplied with "the basic tools of an adequate defense or appeal." The "basic tools" include the assistance of psychiatrist (expert) when the defendant's mental state is a significant factor at trial. Id. at 470 U.S. 105 S.Ct. 1096.

Here, in the instant case, trial counsel was aware of appellant's testimony and his difficulty testifying, remembering, and describing facts and events: on direct examination (4T 151-24 to 152-2; 154-21 to 24; 156-3 to 157); on cross-examination (4T 158-23; 166-16; 5T 21-1 to 20; 24-5 to 16; 27-10 to 14; 28--20; 35-1 to 16; 42-12 to 23; 43-8 to 21; 49-1 to 8; 51-2 to 17; 55-8 to 17; 56-10 to 16; 61-3 to 14; 63-2 to 12; 66-9 to 67-4; 71-2 to 24; and especially at 5T 72-19 to 23; 77-16 to 19; 83-22 to 84-9; 92-7 to 11; 98-16 to 99-13; 108-1 to 20; 116-1 to 3; 116-4 to 20; 118-2 to 13); on redirect-examination (5T 125-23 to 126-4; 127-6 to 11) and re-cross examination (5T 130-21 to 25). Given appellant's low level of intellectual

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[6] The New Jersey Supreme Court has determined that a specific provision of the Public Defender Act, N.J.S.A 2A:158A-5, grants indigent defendants in New Jersey the statutory right to the assistance of experts necessary to their defense. See In re Cannady, 126 N.J. 486, 492 (1991); In re Kauffman, 126 N.J. 499, 501 (1991), finding that the Public Defender Act mandates that the office of the Public Defender pay for expert services that are necessary to any indigent defendant's case.

functioning based on the three expert reports that were stipulated into evidence at the juvenile waiver hearing, it is clear that appellant's limited mental ability and status as a special education student was a significant factor at his trial. (2MT 2-13 to 3-7). Ake v. Oklahoma, supra. 470 U.S. at 74, 105 S.Ct. at 1091; and it was also materially relevant to the jury's assessment of appellant's demeanor and credibility as a witness at trial. See State v. Sexton, 311 N.J. Super. 70, 88 (App. Div. 1998), certif. denied 160 N.J. 93 (1999).

The Ake recognized the need for experts in cases where a defendant's mental health was in question observed, "[p]syhiatrists gather facts through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. . . Unlikely lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state[.]" Id. 470 U.S. at 105 S.Ct. at 1095.

"Elementary principle that when a state brings its judicial power to bear on a indigent defendant, it must take steps to assume that defendant has fair opportunity to present defense, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from belief that justice cannot be equal where, simply as result of his

poverty, a defendant is denied opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Ake, supra. 470 U.S. at 76, 105 S.Ct. at 1092.

In the instant case, the trial record makes perfectly plain that references of appellant being classified as a special education student permeated his trial. (4T 116-1 to 3). Trial counsel's refusal to elicit the aid of an expert deprived appellant of his Constitutional right pursuant to the "due process clause" of the Fourteenth Amendment and the Statutory right pursuant to the Public Defender Act, N.J.S.A. 2A:158A-5, that grant indigent defendants in New Jersey the statutory right to the assistance of experts necessary to their defense.

Trial counsel had no conceivable reason, or strategic grounds for not offering evidence and/or expert testimony to fairly describe appellant's mental status as a special education student. It is also clear from the record that the prosecutor firmly pointed out the the trial judge that appellant's status as a special education student needed to take the form of expert testimony. (4T 115-5 to 8 and 116-4 to 6). In addition, the trial judge never prescribed any curative instruction on this issue. (4T 117-11 to 12).

Therefore, under the circumstances in this case, an ineffective assistance of counsel claim was appropriate for appellate review, because all the necessary facts to raise trial counsel's ineffectiveness on direct appeal clearly lied inside the trial record. It could also have been discovered by simply inspecting the juvenile waiver hearing transcripts, where the same trial counsel also represented appellant. (1MT 2-5 to 6

and 2MT 2-6 to 7).

Appellate counsel's decision not to pursue the gross incompetence of appellant's trial counsel's failure to elicit expert testimony was objectively unreasonable because the omitted issue is obvious from the trial record. Strickland, supra. 466 U.S. at 688, 104 S.Ct. at 2052; Fritz, supra. 105 N.J. at 58 adopting two prong analysis announced in Strickland for evaluating claims of ineffective assistance of counsel); and also State v. Morrison, 215 N.J. Super. 540, 546 (App. Div. 1987) (adopting Strickland and Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 83 (1985), framework for analyzing claims of ineffective assistance of appellate counsel).

In the instant case, appellant urges that appellate counsel's error in failing to raise trial counsel's ineffective assistance on direct appeal prejudiced the appellant. Had appellate counsel raised trial counsel's ineffectiveness on direct appeal appellant contends that he would have prevailed by relying on the trial record, but PCR counsel's failure to present this claim and argue this issue at the PCR proceeding denied appellant the opportunity to present a prima facie claim of appellate counsel's ineffectiveness which in essence warrants appellant a new PCR hearing.

CUMULATIVE EFFORT OF ERRORS

Appellant contends that trial, appellate, and PCR counsels errors were not harmless. Moreover, when viewed cumulatively, the numerous errors by trial, appellate, and PCR counsels deprived appellant of a fair trial, appeal and PCR proceeding

and effective assistance of counsel guaranteed by the State and Federal Constitutions.

In State v. Orrecchio, 16 N.J. 125 (1954), the New Jersey Supreme Court upheld the Appellate Division's reversal of the defendant's convictions on three counts of a 35 count indictment. The reversal was based on the cumulative effect of the numerous errors made throughout the trial. In affirming the Appellate Division, the court observed:

> The sound administration of criminal justice in our democracy requires that both the end and means just. the accused, on matter abhorrent the offense charged, not how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in english speaking countries. This of course, does not mean that incidental legal errors. Which creep into the trial but do not prejudice the rights of the accused or make the proceeding unfair, may be invoked to upset an otherwise valid conviction ... [citation omitted]. Where however, the legal errors are of such magnitude as to prejudice the defendant's rights, or in their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury. [emphasis added]. Id. at 129.

Here, in the instant case, appellant urges that trial, appellate, and PCR counsels numerous errors and omission recounted above severely prejudiced the appellant and undermine confidence in the outcome of the PCR proceeding in this case.

C O N C L U S I O N

For the foregoing reasons, appellant respectfully requests that the order denying post-conviction relief be reversed and his convictions reversed. In the alternative, the appellant submits that the order denying post-conviction relief be reversed and the matter remanded for a full evidentiary hearing on the issue of ineffective assistance of trial, appellate and PCR counsels.

respectfully submitted,

Marvin Mathis, pro se

Dated: December 14, 2009.

BY ORDER OF THE COURT

FILED
FEB 29 2008
JOHN F. MALONE
J.S.C.

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff-Respondent,		
-v-	:	UNION COUNTY CRIMINAL DIVISION
MARVIN MATHIS,	:	INDICTMENT NO 97-02-123
Defendant-Petitioner.	:	ORDER

This matter having been opened to the court by defendant by Petition for Post-Conviction Relief, Lewis D. Thompson, Esq., appearing for the defendant and Sara B. Liebman, Assistant Prosecutor, appearing for the State and the court having considered the pleadings submitted, the oral argument of counsel and for good cause shown,

It is on this 29th day of February, 2008, ORDERED

That defendant's verified Petition for Post-Conviction Relief is hereby denied for the reasons stated on the record on February 29, 2008.

JOHN F. MALONE, P.J.Ch.

A-1

STATE OF NEW JERSEY

v.

MARVIN MATHIS
Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL
UNION COUNTY

INDICTMENT #: 97-02-123

CASE OR PROMIS #: 96 004593-001

ORDER ON POST-CONVICTION APPLICATIONS ON INDICTABLE OFFENSES

This matter being opened on the application of defendant, Marvin Mathis, by:

☐ Petition for Post-Conviction Relief determined to be defendant's

_____ first petition

_____ second or subsequent petition

☐ Motion for Change or Reduction of Sentence pursuant to *Rule* 3:21-10

☒ Motion for reconsideration ~~and the defendant having been represented by~~:

_____, Assistant Deputy Public Defender

_____, Retained or Designated Counsel *(circle one)* or

☐ The court having concluded that there was no good cause entitling the assignment of counsel on the application, and the State having been represented by:

_____ Assistant Prosecutor; and

☐ There having been proceedings conducted on the record on _____, 200_____ or

☒ The matter having been disposed of on the papers;

It is on this 2 day of JULY, 2008 ORDERED THAT DEFENDANT'S APPLICATION IS HEREBY:

_____ Granted
X Denied
_____ Other

For the reasons:

☒ Expressed in the court's written opinion of _____

☐ Expressed orally on the record on _____

JOHN F. MALONE, J.S.C.

ORIGINAL: Office of the Public Defender
c: Judge _____
Criminal Division Manager's Office
Prosecutor's Office
Defendant

Form Order Promulgated by Directive # 7-07, Published, 09/20/2007, CN: 11151-English

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JOHN F. MALONE
PRESIDING JUDGE, CHANCERY

COURTHOUSE
ELIZABETH, NEW JERSEY 07207

July 3, 2008

Marvin Mathis
304144/244859C
P.O. Box 861 NJSP
Trenton, NJ 08625

Re: State v. Marvin Mathis
Indictment No. 97-02-123

Dear Mr. Mathis:

Please be advised that the Court has determined that your Motion for Reconsideration of the Denial of your Petition for Post Conviction Relief should be dismissed. The Petition was denied by Order entered February 29, 2008. The Court is advised that a Notice of Appeal of this matter was filed March 25, 2008, Appellate Division Docket A-3695-07-T4. Rule 2:9-1 provides that supervision and control of the proceedings on appeal shall be in the Appellate Court.

Very truly yours,

JOHN F. MALONE, P.J.Ch.

JFM/pfk

Pa 3

NOTICE OF APPEAL — PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE IN FULL (AS CAPTIONED BELOW):

State of New Jersey
Plaintiff - Respondent

-V.-

Marvin Mathis,
Defendant - Appellant.

ATTORNEY OR PRO SE LITIGANT

NAME Marvin Mathis #304144/244859-C
ADDRESS New Jersey State Prison
P.O. Box 861 / Trenton, New Jersey 08625
TELEPHONE NO. (Above - Continued)
ATTORNEY FOR Defendant - Appellant, Pro Se

ON APPEAL FROM:

Law Division - Union County
TRIAL COURT OR STATE AGENCY

Union County Ind No. 97-02-123
TRIAL COURT OR AGENCY NUMBER

Hon. Judge John F. Malone, J.S.C.
TRIAL COURT JUDGE

CIVIL [ ] CRIMINAL [✓] JUVENILE [ ]

NOTICE IS HEREBY GIVEN THAT Marvin Mathis Defendant - Appellant
APPEALS TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FROM THE JUDGMENT [ ]
ORDER [✓] STATE AGENCY DECISION [ ] ENTERED IN THIS ACTION ON February 29, 2008
DATE

IF NOT APPEALING THE ENTIRE JUDGMENT, ORDER OR AGENCY DECISION, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED. Appellant is Appealing Honorable Judge John F. Malone's Order Denying Defendant's Petition for Post-Conviction Relief on February 29, 2008.

HAVE ALL ISSUES AS TO ALL PARTIES BEEN DISPOSED OF IN THIS ACTION IN THE TRIAL COURT OR AGENCY? YES [✓] NO [ ]

IF NOT, HAS THE ORDER BEEN CERTIFIED AS FINAL PURSUANT TO R. 4:42-2? YES [ ] NO [ ]

IN CRIMINAL, QUASI-CRIMINAL AND JUVENILE ACTIONS:

GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED. On June 18, 1998, A jury found Defendant guilty of Murder, Felony Murder, Robbery, Possession of a weapon for unlawful purpose and unlawful possession of a weapon. On August 14, 1998 Sentenced to an Aggregate term of 50 yrs. with a parole bar of 30 yrs.

IS DEFENDANT INCARCERATED? YES [✓] NO [ ]

WAS BAIL GRANTED OR THE SENTENCE OR DISPOSITION STAYED? YES [ ] NO [ ]

IF IN CUSTODY, GIVE THE PLACE OF CONFINEMENT. New Jersey State Prison, in Trenton New Jersey 08625

(OVER)

ATTACH ADDITIONAL SHEETS IF NECESSARY

NOTICE OF APPEAL AND ANNEXED CASE INFORMATION STATEMENT HAVE BEEN SERVED ON:

	NAME	DATE OF SERVICE
TRIAL COURT JUDGE	Honorable Judge John F. Malone, J.S.C.	02/29/08
TRIAL COURT CLERK OR STATE AGENCY	Clerk, Union County Courthouse	02/29/08
ATTORNEY GENERAL OR ATTORNEY FOR OTHER GOVERNMENTAL BODY PURSUANT TO R. 2:5-1(a), (e) or (h)	Anne Milgram, Office of the Attorney General Hughes Justice Complex - 25 Market Street, P.O. Box 112 Trenton, New Jersey 08625	02/29/08

OTHER PARTIES:

NAME AND DESIGNATION	ATTORNEY NAME, ADDRESS AND TELEPHONE NO.	DATE OF SERVICE

ANNEXED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:

	NAME	DATE OF SERVICE	AMOUNT OF DEPOSIT
COURT REPORTER'S SUPERVISOR, CLERK OF COURT OR AGENCY			
COURT REPORTER	Frederick Wolfe III	2/29/08	$ 0

EXEMPT FROM ANNEXING THE TRANSCRIPT REQUEST FORM DUE TO THE FOLLOWING:

[ ] NO VERBATIM RECORD.

[ ] TRANSCRIPT IN POSSESSION OF ATTORNEY OR PRO SE LITIGANT. [FOUR COPIES, ALONG WITH THE COMPUTER DISKETTE FROM THE TRANSCRIPT PREPARER, MUST BE SUBMITTED.]

[ ] MOTION FOR ABBREVIATION OF TRANSCRIPT FILED WITH THE COURT OR AGENCY BELOW.

[X] MOTION FOR FREE TRANSCRIPT FILED WITH THE COURT BELOW.

I CERTIFY THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF. I ALSO CERTIFY THAT, UNLESS EXEMPT, THE FILING FEE REQUIRED BY N.J.S.A. 22A:2 HAS BEEN PAID:

March 04, 2008
DATE

Jamin Mathis
SIGNATURE OF ATTORNEY OR PRO SE LITIGANT

A 3695-07T4

ORDER ON MOTION

STATE OF NEW JERSEY
VS
MARVIN MATHIS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -003695-07T4
MOTION NO. M -004522-07
BEFORE PART: H
JUDGE(S): STERN

MOTION FILED: MARCH 25, 2008 BY: MARVIN MATHIS
ANSWER(S) FILED:

FILED
APPELLATE DIVISION
MAY 8 2008

RECEIVED
APPELLATE DIVISION
MAY 8 2008
SUPERIOR COURT
OF NEW JERSEY

SUBMITTED TO COURT: MAY 05, 2008

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 6th DAY OF May, 2008, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT - TO PROCEED AS AN INDIGENT AND FOR FREE TRANSCRIPTS	(X)	( )	(X)

SUPPLEMENTAL: The clerk advises that even though the application was filed in 2001, this is an appeal from the denial of defendant's first petition for port conviction relief. It is a timely appeal from a decision of February 29, 2008. The matter is referred to the Public Defender for representation subject to any necessary or appropriate investigation as to indigency.

UNN 97-02-123

FOR THE COURT:

JURLC4

EDWIN H. STERN P.J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

Marvin Mathis 304144 244859C
New Jersey State Prison
P.O. Box 861
Trenton NJ 08625

Superior Court of New Jersey
Law Division - Union County
Ind. No. 97-02-123

State of New Jersey,	:	
Plaintiff-Respondent;	:	Criminal Action
v.	:	On Petition for Postconviction Relief
Marvin Mathis,	:	
Defendant-Petitioner.	:	

Memorandum of Law and Appendix in Support of Petition for Postconviction Relief

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Table of Cases Cited

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Table of Cases Cited Cont'd

Table of Rules Cited

Table of Statutes Cited

Table of Statutes Cited Cont'd

Other Materials Cited

Table of Transcript

1T refers to Juvenile Waiver Hearing Transcript dated November 11, 1996.

2T refers to trial transcript dated June 9, 1998.

3T refers to trial transcript dated June 10, 1998.

4T refers to sentencing transcript, dated August 14, 1998.

Index to Appendix

Point I

Defendant's State Constitutional Right to Indictment by Grand Jury was Violated when the Facts Required to be Found Before Defendant Could be Tried as an Adult were not Charged in the Indictment. Furthermore, Defendant's Federal and State Constitutional Rights to Trial by Jury were Violated when a Judge made the Findings that Resulted in Defendant being Tried as an Adult, and not as a Juvenile.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court of the United States held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. 2362-63. In an earlier opinion, the Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). More recently, in Ring v. Arizona, the Court answered in the affirmative the question whether Apprendi required that a jury, and not a judge, find the facts necessary for imposition of capital punishment. 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Defendant contends that a logical extension of Apprendi, Jones, and Ring requires that a jury, not a judge, find the